No. 79-1538

MICHAEL RODAK, JR.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR,
Appellant,

v.

VIRGINIA SURFACE MINING AND RECLAMATION ASSOCIATION, INC., ET AL.,
Appellees.

On Appeal from the United States District Court Western District of Virginia

BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

RONALD A. ZUMBRUN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
COUNSEL OF RECORD
EILEEN B. WHITE
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae Pacific Legal Foundation

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BRIEF OF AMICUS CURIAE PACIFIC LEGAL FOUNDATION IN SUPPORT OF APPELLEES

INTEREST OF AMICUS CURIAE

Pacific Legal Foundation (PLF) respectfully submits this brief in support of appellees Virginia Surface Mining and Reclamation Association and the Commonwealth of Virginia pursuant to Supreme Court Rule No. 36. Consent to the filing of this brief has been granted by counsel for all parties. Copies of these letters have been submitted to the Clerk of this Court.

PLF is a nonprofit, tax-exempt organization with offices in Sacramento, California, and Washington, D.C., existing for the purpose of engaging in litigation in matters affecting the broad public interest. Policy for PLF is established by an independent Board of Trustees composed of concerned citizens. The Board evaluates the merits of any contemplated legal action and

authorizes such legal action only where PLF's position has broad support within the general community. The PLF Board has authorized the filing of this brief.

The government is appealing from the decision of the United States District Court of Virginia, Western District, which held, *inter alia,* that: (1) Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act of 1977[1] (Act), which prescribe certain reclamation performance standards for surface coal mining operations conducted on steep slopes, violate the Tenth Amendment; and (2) Sections 515(d) and (e) and Section 522[2] of the Act take private property without just compensation in violation of the Fifth Amendment. PLF will address those issues, showing that the District Court's holdings were correct and should be upheld.

PLF's concern in this proceeding is that the federal government not interfere with constitutionally guaranteed private property rights and the traditional regulation of those property rights by the states rather than by the federal government. PLF is also interested in insuring that when the federal government does take property, it pays just compensation as required by the Constitution.

PLF contends that when a law diminishes the value of property to the point where it becomes virtually worthless, then a compensatory taking has occurred. In this case, appellees' property value is so regulated that there is no remaining reasonably beneficial use. The Act caused this drastic diminution by preventing the appellees from taking advantage of the abundant coal deposits that lie just under the surface of appellees' land. The impact extends, however, beyond the landowner to the public seeking affordable energy sources. Specifically, Sections 515(d) and (e) of the Act require appellees to restore the land to its approximate original contours after strip-mining, a task which, from an economic standpoint, makes it totally infeasible to mine the coal. In effect, the law controls surface mining by preventing businesses from engaging

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[1] 30 U.S.C. § 1265(d) and (e).

[2] 30 U.S.C. § 1272(e).

in it. PLF agrees with the District Court that the drastic decrease in appellees' land value caused by the Act constitutes a taking for which just compensation must be paid in accordance with the Fifth Amendment.

The provision requiring return to approximate original contours was drafted in disregard of plain common sense. For example, if a community determines that some of the contours resulting from surface mining serve a socially useful purpose, this law does not permit those contours to remain. Instead, they must be restored. In many Appalachian towns where leveled land is at a premium, the prohibition against keeping leveled ground in that condition creates serious problems. The District Court found that steep-slope land restored to its approximate original contour is worth between $5.00 and $75.00 per acre; whereas if it were leveled, it would be worth between $5,000 and $300,000 per acre. The government's solution to the Act's requirement that hillsides be restored (despite apparent local preferences to the contrary) is, at least, novel. The government argues that the Act does not prevent land from eventually remaining with the contours created by surface mining. In order to stay within the bounds of the law, one merely has to restore the contours of the land—thereby gaining compliance—and then bulldoze it a second time.[3] Besides creating a totally absurd result, that solution causes considerable economic waste.

Furthermore, notwithstanding the provisions of the Act, other federal regulations have surface mining in a regulatory stranglehold. The numerous regulations (*e.g.*, Clean Air Act and Water Pollution Control Act) provide ample federal control over how surface mining is conducted while still protecting the environment. The Act's provisions merely add to the regulatory morass which already makes it difficult to conduct surface coal mining operations.

This problem of regulatory overkill is especially counterproductive to the public interest where surface coal mining is

[3] Brief for the Secretary of the Interior at 35, 53.

concerned. Surface mining of domestic coal reserves, such as those located in Virginia, provides one of the best solutions to one of the gravest problems facing America—namely, its great dependence on foreign sources of energy. Yet, even though the coal produced from surface mines would provide a rapid and cheap way to decrease that dependence, Sections 515(d) and (e) and Section 522 of the Act not only stifle, but virtually shut off that method of domestic energy production.

Finally, PLF strongly supports environmental protection. PLF does not, however, believe that the goal of restoring a pristine environment should be sought without regard to the costs. Instead, PLF contends that there should be a balance between environmental protection and the economic growth required to maintain our civilized society. Requiring steep slopes to be returned to their approximate *original* contours does not strike a proper balance because it ignores several key considerations: (1) more productive use can often be made of level or gently sloping land than of steeply sloping land; (2) requiring steep slopes to be restored often ignores the wishes of local communities that require more level areas to sustain growth; (3) the arbitrary imposition of requiring that surface-mined land be returned to its approximate original contour can have environmentally degrading effects in certain circumstances; (4) requiring a return to the original contour freezes out small businesses which cannot afford the expensive restorations, thus lessening competition, the foundation of our free enterprise system; (5) prohibiting surface mining puts miners out of work; (6) limiting coal production in this manner raises the cost of coal to consumers; and (7) limiting the production of coal—a plentiful domestic energy resource—is counter-productive to the effort to decrease our dependence on foreign supplies of energy.

SUMMARY OF ARGUMENT

The first question that PLF will address is whether the Commonwealth of Virginia and its subdivisions' control over

the traditional state and local power to regulate land use has been usurped by the federal government in violation of the Tenth Amendment. Specifically, Sections 515(d) and (e) of the Act unlawfully infringe on states' rights by stripping the states of their power to regulate land use where surface mining takes place. The District Court correctly held that Congress did indeed violate Tenth Amendment limitations on federal activities by enacting Sections 515(d) and (e) of the Act. PLF urges that the Court affirm that decision.

PLF will also argue that Sections 515(d) and (e) and Section 522 of the Act have rendered the appellees' land virtually worthless, constituting a taking requiring the payment of just compensation. The Act's provisions require appellees' steep slopes to be returned to their approximate original contour after surface mining and prohibits surface mining in certain areas altogether. Compliance with these provisions, however, destroys the value of appellees' property by making it economically infeasible, and in some instances simply unlawful to mine the abundant mineral wealth.

ARGUMENT

I

THE SURFACE MINING CONTROL AND RECLAMATION ACT VIOLATES THE TENTH AMENDMENT BY USURPING THE STATES' TRADITIONAL POWER TO REGULATE LAND USE

The basic structure of government contained in the United States Constitution is that of a federal government of limited powers governing a union of states which possess the remainder of governmental power. This concept is expressed most clearly in the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States are reserved to the States respectively, or to the people." Thus, the federal government cannot validly exercise powers other than those expressly granted to it.

It is well established that the Constitution does not grant to the federal government the police power. (The police power is the governmental power to subject individuals to reasonable regulations in order to achieve such governmental objectives as the public health, safety, and welfare. *Goldblatt v. Hempstead,* 369 U.S. 590 (1962).) Thus, Congress may not enact police power regulations to operate within the territorial limits of a state. *United States v. Dewitt,* 76 U.S. 41 (1869). The police powers are instead reserved to the states. *Keller v. United States,* 213 U.S. 138 (1909); *Sinnot v. Davenport,* 63 U.S. 227 (1859). Their legislatures delegate the police power to local governing bodies, and it is used to support various forms of state and local regulation.

Land use regulation is one of the traditional police powers exercised by the states and their political subdivisions. *Village of Euclid v. Ambler Realty Company,* 272 U.S. 365 (1926). Indeed, it is an essential state function because it allows the states to balance environmental protection with the many types of activities upon which their economies are based. This Court has long held that each state has full jurisdiction to regulate the land within its borders, without federal interference. For example, in *Kansas v. Colorado,* 206 U.S. 46 (1906), Kansas sued Colorado for diverting the waters of the Arkansas River for the irrigation of lands in Colorado. The United States intervened, claiming a right to control the waters of the river to aid in reclamation of federally owned arid lands. It argued that it had the right to use the waters pursuant to the Reclamation Act, 43 U.S.C. §§ 37l, *et seq.* The Court, in dismissing the United States' claim, relied upon Article IV, Section 3, clause 2, of the Constitution which provides that Congress has the power to make all necessary rules and regulations regarding its property. The Court held that the provision limits Congress to exercising its power over property belonging to the United States, and does not allow for any legislative control over the property of the individual states.

This Court should reaffirm the holding of *Kansas* here and find that Congress cannot exercise legislative control over land that it does not own in individual states. In promulgating the

Act, Congress decided that the regulation of surface mining and reclamation basically belongs to the states because of the differences in "terrain, climate, biologic, chemical and other physical conditions in areas subject to mining operations." 30 U.S.C. § 1201(f). However, the states have no choice but to adopt the federal standards as their own or else hand over total control of surface coal mining to the federal government.[4] While the Clean Air Act and the Federal Water Pollution Control Act have similar requirements, an important difference is that air and water pollution are carried interstate. Land, however, is unique in that it is permanently situated within a state's boundaries. Indeed, without that characteristic, the definition of "boundaries" would be rendered meaningless. Thus, the Act, by forcing states to adopt the federal regulations as their own (if the states prefer not to engage in that charade, the federal government will simply supply its own regulations) denies the states their traditional broad discretion to legislate pursuant to the police power "so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity." *Keller,* 213 U.S. at 145.

In addition to the Act being unconstitutional, its provisions disregard totally the economic realities of the land. The Act's provisions are impossible for appellees to comply with and still stay in business. For example, the Act requires that steep slopes shall be returned to their approximate original contour after surface mining. Ninety-five percent of Virginia's strippable coal is located on slopes in excess of 20 degrees. To return those slopes to their original contour is such an expensive procedure that to do so gives mine operators the choice of either operating at a loss or setting the price of the coal at a level which makes it noncompetitive. Either way the result is the same for surface mine operators—bankruptcy. Apparently Congress decided to sacrifice the livelihood of persons involved in surface coal mining and also the energy that coal would produce for America in favor of turning appellees' land into a

[4] Congress provided that each state must adopt mandatory standards as determined by the Secretary of the Interior if it wishes to continue to regulate land used for surface coal mining. 30 U.S.C. § 1253.

hill museum. Moreover, as the District Court recognized, since so much of Virginia's terrain is mountainous, a great need exists for level land to build schools, airports, industries, recreation areas, shopping centers, and for farming.

Another provision of the Act prohibits surface coal mining near roads, public buildings, schools, churches, public parks, community buildings, and cemeteries. 30 U.S.C. § 1272(e). This is a blatant example of the federal government exercising the police power to regulate land use. It is also an example of wrongful meddling by the federal government with an integral state function—namely, the right to decide how its land shall be used. This Court has firmly held that such federal involvement with functions which are integral to state governments is unconstitutional. In *National League of Cities v. Usery,* 426 U.S. 833 (1976), at issue similarly was the constitutionality of a federal statute which regulated an integral state function. Specifically, the statute was the Fair Labor Standards Act which extended minimum wage and maximum hour provisions to almost all employees of the states and their political subdivisions. This Court held that Congress may not exercise its power to regulate commerce so as to force directly upon the states its choices as to how essential decisions regarding the conduct of integral governmental functions are to be made. 426 U.S. at 851.

Governmental functions such as fire prevention, police protection, sanitation, public health, and parks and recreation are among those the Court considered to be integral governmental functions best left to the states. However, this Court also noted that those examples are not an exhaustive catalogue of "activities which are well within the area of traditional operations of state and local governments." *National League of Cities,* 426 U.S. at 851 n.16. PLF believes that land use regulation is rightfully one of those traditional functions belonging to the states. Certainly land use regulation has traditionally been, and still is, a basic and essential governmental function of the states and their political subdivisions. 426 U.S. at 855. Indeed, if this Court were to make a finding that land

use regulation is *not* an integral state function, it would then be difficult to conceive of a basis upon which any other functions would still be reserved to the states.

II

THE SURFACE MINING CONTROL AND RECLAMATION ACT REDUCES THE VALUE OF APPELLEES' LAND SO SUBSTANTIALLY AS TO CONSTITUTE A TAKING OF PRIVATE PROPERTY, REQUIRING THE PAYMENT OF JUST COMPENSATION

A. Protection of Personal Rights In Property Against Government Intrusion Is a Fundamental Precept of the Federal Constitution

American political scientists and legal scholars have pointed to protection of personal rights in property as the fundamental motivation for adopting the Constitution.[5] The express constitutional restrictions on governmental interference with private property have been augmented by judicial doctrine.[6] This Court has stated unambiguously that the Fifth Amendment's guarantee that private property shall not be taken for public use without just compensation (applicable to the states through the Fourteenth Amendment) operates as a limitation on the exercise of the police power. *Goldblatt,* 369 U.S. 590; *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393 (1922).

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[5] *See* B. Siegan, *Economic Liberties and the Constitution* at chs. 2-4 (1980).

[6] For example, nineteenth century jurists broadly construed the Contract clause of the United States Constitution, Article I, Section 10, as a means of protecting vested property rights against unjust government interference. *E.g., Fletcher v. Peck,* 10 U.S. (6 Cranch) 87 (1810); *Trustees of Dartmouth College v. Woodward,* 17 U.S. (4 Wheat) 518 (1819).

B. The General Law Regarding Eminent Domain and the Police Power Demonstrate that the Surface Mining Control and Reclamation Act's Land Use Provisions Constitute a Taking

Even assuming, *arguendo,* that the Act does not usurp the states' traditional police power over regulation of land use, this Court should still affirm the District Court's holding that the Act so diminishes the economic value of appellees' land as to amount to a taking of property without compensation in violation of the Fifth Amendment to the United States Constitution. The Fifth Amendment forbids federal actions which abridge property rights, stating that:

> "[N]o person shall . . . be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

It is well settled by this Court that under the Fifth Amendment, property owners have a personal right to the use and enjoyment of their property without unlawful deprivation. Thus, the Court held:

> "[A] fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other." *Lynch v. Household Finance Corp.,* 405 U.S. 538, 552 (1972).

This includes the right to possess, use, and dispose of property. *United States v. General Motors Corp.,* 323 U.S. 373, 377-78 (1945).

Governmental restrictions on the unfettered use of one's property have occurred traditionally in either one of two generally recognized ways. The first is through the power of eminent domain, in which private property is taken by the government to further a public purpose. When such takings occur, the landowner is constitutionally entitled to just compensation, and title passes to the government. *See Boston Chamber of Commerce v. Boston,* 217 U.S. 189, 195 (1910).

The second method by which the government restricts private land use is through the exercise of the police power.[7] This method arose initially out of attempts by the government to curb noxious activities by the landowner that constituted a nuisance. *See Hadacheck v. Sebastian,* 239 U.S. 394 (1915). However the police power has been expanded to include regulation of other than noxious uses. *See, e.g., Village of Belle Terre v. Boraas,* 416 U.S. 1 (1974) (upholding zoning ordinance which limited the occupancy of one-family dwellings to traditional families or to groups of not more than two unrelated persons). However, constitutional limits on the exercise of the police power do exist: such power cannot be exercised in a manner which imposes either arbitrary, discriminatory, or otherwise unreasonable restrictions on the use of one's private property. Nor can it impose restrictions which eliminate the possibility of making any reasonably beneficial use of the property.

The instant case presents the issue of whether a federal statute which so regulates appellees' land as to render it valueless constitutes an unlawful taking of appellees' property in violation of the Fifth Amendment. In an inverse condemnation case squarely on point, *Pennsylvania Coal Co.,* 260 U.S. 393, this Court held that a restriction on the right to mine coal amounted to a taking of private property requiring the payment of just compensation. The Court acknowledged that the state was exercising its police power in order to promote public safety when it prohibited the extraction of coal in a way that caused subsidence of the surface. However, the Court held that the regulation was too restrictive to be upheld, pointing out that "a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the Constitutional way of paying for the change." *Pennsylvania*

[7] For a discussion of the distinction between eminent domain and the police power, *see* Sackman, *The Impact of Zoning and Eminent Domain Upon Each Other,* 1971 Institute on Planning, Zoning and Eminent Domain 107, 110-111.

Coal Co., 260 U.S. at 416. Likewise, this case is before the Court for a determination that restrictions on mining are excessive, even though they were enacted to promote public safety.

Sections 515(d) and (e) require reclamation of surface mined lands, but those provisions do so in a manner which prevents Virginia surface miners from mining because the costs of reclaiming lands in accordance with the Act are prohibitive. Section 522 goes a step further by denying the landowners the right to decide whether or not to mine their land. It specifically prohibits (rather than regulates) surface mining on certain specified lands. Thus, this case, so analogous to the facts in *Pennsylvania Coal Co.*, deserves the same outcome—namely, invalidation of the unconstitutional provisions until such time as just compensation is paid.

Moreover, this Court has held that the right to mine coal is valuable because it can be exercised for profit. Thus, "to make it commercially impracticable to mine certain coal has very nearly the same effect for constitutional purposes as appropriating it or destroying it." *Pennsylvania Coal Co.*, 260 U.S. at 414. The District Court found, after a 13-day trial, that the Act makes it commercially impracticable to surface mine coal in Virginia. This Court should accept the District Court's findings and apply the holding in *Pennsylvania Coal Co.* to this case to find that Sections 515(d) and (e) and Section 522 of the Act constitute a taking.

This Court has stated that it is proceeding on a case by case basis in inverse condemnation cases to determine when a compensable taking has occurred. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). In *Penn Central Transportation Co.*, Penn Central was prohibited from developing the air space above the Grand Central Terminal pursuant to New York City's Landmarks Preservation Law. The Court, in holding that there was not a taking, stated that Penn Central had not been denied all reasonable use of the property.

By contrast, appellees are deprived of virtually all reasonable use of their property. The only reasonable use for appellees' land is to remove and utilize the mineral wealth by

surface mining it. However, surface mining triggers the reclamation provisions of the Act which make it economic suicide to proceed. Furthermore, the Act prohibits all surface mining in certain specified areas. Thus, appellees cannot settle simply for less profit as the plaintiff in *Penn Central Transportation Co.* did. (Penn Central still maintained a profit from Grand Central Terminal.) Instead, appellees' land, so rich in mineral wealth, is virtually valueless since the coal is marketable only when removed from the ground.

Furthermore, in *Kaiser Aetna v. United States,* 444 U.S. 164 (1979), this Court recently expanded its dicta from *Penn Central Transportation Co.* that a state statute which substantially furthers public policies may so frustrate distinct investment-backed expectations as to amount to a "taking." In *Kaiser Aetna,* a private developer in Hawaii converted an inland pond contiguous to a navigable bay into a marina by dredge and fill operations that connected the pond to the bay. The United States Army Corps of Engineers (Corps) allowed the construction of the marina without requiring a permit. Later, the Corps contended that the developer was precluded from denying the public access to the pond because, as a result of the improvements, the pond had become a navigable water of the United States. This Court held that the former pond constituted navigable water subject to federal regulatory authority. However, the Court concluded that the Fifth Amendment's Taking Clause precluded the federal government from creating a public right of access to the pond, without compensating the owner.

In examining the "taking" question, the Court identified several factors of particular significance—the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the governmental action. By applying those factors to appellees' situation, it is clear that their investment-backed expectations are thoroughly dashed by the Act's provisions and therefore a taking has occurred. Due to the Act's reclamation provisions and total prohibitions from mining in certain areas, appellees are unable to mine coal profitably, if at all. The severe economic impact of

the Act upon mine operators was shown unquestionably during the District Court trial. Indeed, the Act is so restrictive that it goes beyond the legitimate exercise of the police power to regulate for the public health, safety, and welfare. Thus, it requires that just compensation be paid to appellees or that the Act be invalidated. As the Court has previously announced, the Just Compensation Clause of the Fifth Amendment is intended to

> "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States,* 364 U.S. 40, 49 (1960).

CONCLUSION

PLF respectfully submits that the District Court properly found that: (1) Sections 515(d) and (e) of the Surface Mining Control and Reclamation Act violate the Tenth Amendment to the Constitution by depriving the states of their traditional power to regulate their land, and thus their economy; and (2) Sections 515(d) and (e) and Section 522 of the Act diminish the economic value of appellees' coal bearing land so drastically as to amount to a taking of property without just compensation in violation of the Fifth Amendment to the Constitution. Thus, the District Court's ruling that those sections are invalid should be upheld. Such a ruling would allow a sharp increase in America's use of domestic sources of energy and, in turn, decrease our reliance on foreign supplies which are subject to interruption, cutoff, and rapidly spiraling prices. Increasing our energy self-sufficiency will benefit all segments of American society; it will help our balance of payments, lessen inflationary pressures, decrease the rate of unemployment, and make our country more secure strategically.

Respectfully submitted,

RONALD A. ZUMBRUN
Pacific Legal Foundation
455 Capitol Mall, Suite 600
Sacramento, California 95814
Telephone: (916) 444-0154

RAYMOND M. MOMBOISSE
COUNSEL OF RECORD
EILEEN B. WHITE
Pacific Legal Foundation
1990 M Street, N.W., Suite 550
Washington, D.C. 20036
Telephone: (202) 466-2686

Attorneys for Amicus Curiae
Pacific Legal Foundation

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